



In The
SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1048

ANTHONY J. CANON,
Petitioner

V.

COMMONWEALTH OF MASSACHUSETTS,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME JUDICIAL COURT OF THE
COMMONWEALTH OF MASSACHUSETTS

PETITIONER'S REPLY BRIEF

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The Commonwealth's Memorandum In Opposition so blatantly misstates the facts in the course of attempting to obfuscate the issues that a response is mandated. The Commonwealth is no doubt aware of the Court's proper reluctance to determine constitutional issues on a record with controverted facts, but this case is not so disabled. Only the Commonwealth's fundamental misstatements of fact make it appear so.

Relative to the Confrontation Clause question, on the crucial point of the identity of issues in the civil and criminal trials, the Commonwealth says (p. 6) that "Canon, in the civil suit, attempted to prove that the contract was valid and not void as against public policy. . . . [that he] had to establish by examinations of Lynch and Curley, that no criminal activity had occurred which violated Mass. Gen. Laws c. 268A." That simply is not true. Canon neither "had" nor "attempted" to prove the absense of criminal activity at the civil trial. In their answer to Canon's contract complaint, Lynch and Curley alluded generally to c. 268A as one of their affirmative defenses, but, as noted in the Reasons For Granting The Writ, that chapter includes at least one section with non-criminal strictures, and also subtends the traditional crimes of bribery and extortion. Not only did Canon have no proof obligations on this general affirmative defense, the defendants themselves made little effort to establish it. A reading of the trial transcript does not include a single question, a comment of counsel, anything to indicate that the affirmative defense envisaged were the technical conflict of interest crimes, or specifically §17, and, of course, no one could know then that §17 would be so uniquely interpreted as the Supreme Judicial Court later came to do in this case. The defendants did not address the issue, Canon did not "attempt to prove" a negative--c. 268A was a "nonissue" at the civil trial. There was no "identity of issues" in the civil trial--by no stretch of even hindsight imagination--for the additional reasons specified in Mr. Justice Liacos's dissent

and in the Petition herein. It is unseemly for the Commonwealth to try and make it appear otherwise by the expedient of misstatement. Obfuscation is further fostered by the Commonwealth ignoring the unique legal reality presented here: the first and only reported decision ever to hold that prior civil testimony is admissible in a criminal trial. The state takes no issue with that stark fact; it simply does not address it.

The Commonwealth then tries to eliminate the second important question presented by characterizing it as a matter of a state interpreting it's law and the correctness of jury instructions, and in the course of that effort again egregiously misstates the facts. The actual question presented (also wholly ignored in the Commonwealth's memorandum) is a very different one: whether it is a denial of due process by a state appellate court itself to rule that if the jury had been properly instructed, it would have convicted the defendant. Petitioner does not question a state's basic right to interpret it's own laws. He does contend, as one of the dissenters here put it, that it is, however, unconstitutional for such an appellate court interpretation of a statute to "be used retroactively to validate a conviction based on an entirely different theory of what constituted the offense." Such a holding, as the second dissenter clearly perceived, "is improperly to invade the province of the jury". The trial court's instructions are relevant to this issue only to the extent that they presented to the jury "an entirely different theory of what constituted the offense" subsequently defined for the first time in

the appellate court's opinion. If the jury instructions mirrored the subsequent appellate court interpretation, then, of course, this entire issue would be nonexistent. The Commonwealth says (ps. 7-8) they did, that the instructions were the same as the appellate interpretation. That just is not so. The Commonwealth misstates the crucial fact. Both dissenters made that plain, and it was the principle reason for their dissents. Justice Liacos says (Pet'n. App. p. 34), "this record reveals ['the view of the statute taken by the majority of this court' was] not followed at the trial by either the prosecutor or an able trial judge", and Justice Abrams says (Pet'n. App. p. 51), that the jury instruction was "not in accord with the interpretation this court today places on §17(a)." They are clearly correct, and we are not dealing with subtle nuances: the trial judge charged that the receipt of any money from a private source by a municipal employee alone made out a crime under §17(a). The Supreme Judicial Court clearly held that more was required, some consideration by the employee, here, a promise to render engineering services. No jury ever passed on the crime as so defined. A reading of only the majority opinion would, admittedly, not disclose this basic fact (the majority even says, inexplicably, that the charge was "adequate" [Pet'n. App. p. 28]), but that is but another indicia of the "bad judging" here involved, an intellectually dishonest gossamer over what the majority had really done. The Commonwealth's Memorandum compounds the dishonesty.

More "sand in the air" is the Commonwealth's principle argument on this issue (ps. 8-9), that

"the defendant took no exception to the judge's instructions." Even if that were true, it is immaterial, since the error alleged is by the appellate court, but it is not true. Even this attempt to blur the issue is grounded on a misstatement of fact. Counsel's very first exception (Trial transcript, p. 853) was to the trial judge's failure to give his "Requests [For Instructions] 1 through 10", which included his view of §17(a), which was contrary to the instruction given, and the transcript is replete with pages of specific argument in the lobby about the correct interpretation of the statute, and in the course of arguments on the motions for directed verdicts before and after the jury verdict. The majority opinion does, erroneously, say in passing (Pet'n. p. 28) that "the defendant took no exception to the charge", but both dissenters specifically correct that error also in what is footnote 1 in each dissent (Pet'n. ps. 33; 51). Fundamentally, however, this issue of the Supreme Court's own denial of due process remains, even if no exception were taken to the charge. The constitutional error is the appellate court's, not the trial court's.

The Commonwealth's final attempt to "muddy the waters" on this issue is its argument (ft. nt. p. 7) that "the issue is not ripe for review" because petitioner "did not claim a denial of his right to jury trial" in the Supreme Judicial Court. Obviously, petitioner did not argue that issue initially in his brief, because until the opinion was handed down there was no such error. As the Petition here makes plain, the claimed denial of due process is by "the

Massachusetts Supreme Judicial Court itself." When the opinion displayed the error, however, petitioner duly filed a Petition For Rehearing (set out in full on pages 55-62 as part of the Appendix to this Petition), and one of the arguments therein summarized is this one: (ps. 59-61) that the court's ruling "abrogates entirely the defendant's right to trial by jury.... the Court cannot constitutionally now empanel itself as a super jury and say that under the correct interpretation of the statute, now, quite uniquely, devised, Canon is guilty. No appellate court can do that -- it simply cannot under our constitution -- but by its opinion this Court has" (Emphasis in original). The issue is "ripe for review". It was presented clearly as soon as it arose in the only guise then available. Again, the Commonwealth misstates the facts.

With the corrections, it is hoped that the Court can see that these two fundamental constitutional errors are presented on a stark and unarguable record. Only the Commonwealth's overzealous advocacy appears to make the facts ambiguous.

Respectfully presented,

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